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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

LUTHER R. CAMPBELL A/K/A LUKE SKYYWALKER, *et al.*,

Petitioners,

—v.—

ACUFF-ROSE MUSIC, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF COMPOSERS AND SONGWRITERS FRED EBB, JOHN KANDER, JERRY LEIBER, ALAN MENKEN, MIKE STOLLER, AND THE ESTATES OR TRUSTS OF IRVING BERLIN, LEONARD BERNSTEIN, IRA GERSHWIN, GEORGE GERSHWIN, OSCAR HAMMERSTEIN, LORENZ HART, DOROTHY AND DUBOSE HEYWARD, JEROME KERN, ALAN JAY LERNER, FREDERICK LOEWE, COLE PORTER AND RICHARD RODGERS, *AMICI CURIAE*, IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICI CURIAE*

This brief supporting respondent is submitted in opposition to the misplaced efforts of petitioners and their supporters to persuade this Court to carve out a special presumption favoring commercial parody as a fair use. That presumption would be contrary to the statutory fair use scheme and principles authoritatively expressed in prior decisions.

This brief is filed, with consent of the parties, on behalf of writers and composers (or their heirs) of many of the most well-known, celebrated and prized works of 20th century American music, who believe that their experience and perceptions may be helpful to this Court's further articulation of fair use principles in the context of this case. This *amici* group consists of songwriters and composers Fred Ebb, John Kander, Jerry Leiber, Alan Menken, and Mike Stoller, and the estates or trusts of such luminaries as Irving Berlin, Leonard Bernstein, George Gershwin, Ira Gershwin, Oscar Hammerstein, Lorenz Hart, Dorothy and DuBose Heyward, Jerome Kern, Alan Jay Lerner, Frederick Loewe, Cole Porter and Richard Rodgers, whose musical works are so numerous and well-known that they need no further identification.

SUMMARY OF ARGUMENT

1. There is no more reason for according commercial or other parodies and satirical uses a favorable presumption of fair use than there was in *Harper & Row, Publishers, Inc. v. Nation Enter.*, 471 U.S. 539 (1985) ("*Harper & Row*"), where this Court rejected a similar plea for special treatment of news reporting uses. Whether a given use of copyrighted expression claimed to be a parody or satirical use is fair use should be governed by the statutory factors and equitable considerations whose application Congress directed on the facts of each case, and that guided this Court's fair use analysis in *Harper & Row*, *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984) ("*Sony*"), and *Stewart v. Abend*, 495 U.S. 207 (1990) ("*Stewart*"). *See* pp. 5-6, 10-28. On the facts of this case,

such fair use analysis should result in affirmance of the judgment below. *See* p. 29.

2. *Amici* and the many others like them are the intended beneficiaries of Section 115 of the 1976 Copyright Act (17 U.S.C. § 115), which — in a key provision inexplicably omitted from discussion in the briefs of petitioners and most of their *amici* — *excludes* from its statutory compulsory license the making and distribution of recorded performances that pervert, distort, travesty or otherwise alter the "fundamental character" of a copyrighted song. This exclusion was intended and has the effect of granting songwriters and their heirs enforceable rights of creative control and the means to protect the artistic integrity of their works. Copyright owners may choose to grant others permission to make fundamental changes of the song, and to exploit the market in that way, but they may also decline to do so. If parodies are presumptively fair use, however, then the control provided by § 115 is purely illusory and *amici's* songs and music may generally be perverted, distorted and travestied or otherwise altered in the name of parody or satire. *See* pp. 6-9.

3. It is easy to claim that a work is a parody or a satire, and if the judgment below were reversed the number of those who would use the songs of the *amici* and other successful writers and composers for commercially exploitative purposes (whether for travesty, or to free-ride on the original's creativity or popularity), without asking for permission, would promptly and substantially harm the value of their works. A use like petitioners' copying of the central musical theme of "Oh, Pretty Woman," on recordings of which more than 248,000 copies were sold, is not a fair use, and differs in decisive respects from other particular uses that might, in given circumstances, qualify as fair use in accordance with traditional fair use doctrine. *See* pp. 23-28.

ARGUMENT

Amici have earned great artistic success by their many creative achievements, and they continue actively to reap the economic rewards of those efforts both by licensing performance and recording of their works and by authorizing the creation, performance and recording of derivative works. They have, for example, extensively licensed their songs for performance in theaters and cabarets, for use in films, radio and television, and for recordings, and have authorized the creation, performance and recording of parodies, satires, advertising themes and other derivative works based on those songs. Examples of such licensed uses, including parodies of *amici's* works, are provided in Addendum A below.

In often agreeing to requests for such licensing or authorization, *amici* have, to their own economic benefit, disseminated their works even more widely throughout the nation and indeed around the world. When declining such requests, *amici* have often acted in the belief that from an economic standpoint the proposed uses would adversely affect the potential market for future performances of the original work or of previously licensed derivative works, or performances or licensing of new derivative works. On other occasions, *amici* have declined such requests, with equal legitimacy, on grounds of artistic integrity and creative control.[1]

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[1] *See Harper & Row*, 471 U.S. at 555, 564 (recognizing that copyright protects artistic interest in creative control through, *inter alia*, strong right of first publication); *Stewart*, 495 U.S. at 228 ("although dissemination of creative works is a goal of the Copyright Act, the Act creates a balance between *the artist's right to control the work during the term of the copyright protection* and the public's need for access to creative works") (emphasis added); *Gilliam v. American Broadcasting Co.*, 538 F.2d 14, 23 (2d Cir. 1976) (copyright, including exclusive right to license derivative works, necessarily provides artists with right to control artistic creation). *See also* Note, *An Author's Artistic Reputation Under the Copyright Act of 1976*, 92 Harv. L. Rev. 1490,

(continued...)

A producer seeking a license for *My Fair Lady* might have a reputation for mounting dreadful productions; or a proposed singer might be thought incompetent; or a production at the Kennedy Center might be deemed more "prestigious" than a production elsewhere; or a production might alter or travesty the work and make it less valuable in the long run, such as a recently proposed homosexual production of *Oklahoma* under the title *Oklahomo*, for which a license was denied. (Characterizing that production as a parody would not, *amici* believe, make it fair use.)

When *amici* deny licenses to protect against tarnishment they are not muzzling critical reviews. Criticism is not the same thing as perversion, travesty or distortion, or other alteration of a copyrighted melody or its lyrics seeking to hitchhike on its popularity. Neither fair use nor the First Amendment provides an easy shelter for the piggybacking use of a famous melody or its lyrics, in a substantially altered form, where the purpose of that unauthorized use, however characterized, is primarily for commercial gain. Neither do they provide an easement authorizing third parties to take the heart or essence of a copyrighted song, to substitute, for example, coarse or vulgar lyrics, and to justify the distortion by calling it parody, satire or social commentary.

Petitioners and their *amici* contend, in doomsday fashion, that affirmance here would produce censorship antithetical to First Amendment values that would immediately halt the further distribution of socially important criticism and comment, and therefore commercial parody should be given a preeminent favored position in fair use doctrine. As a matter of precedent, experience and public policy, both the premise and the conclusion of the argument are wrong and should be rejected.

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[1](...continued)
1502-04 (1979) (describing how the Act enhanced rights of creative control).

I. COPYRIGHT LAW, THE ENGINE OF CREATIVITY AND FREE EXPRESSION, GRANTS COPYRIGHT OWNERS FOR A LIMITED PERIOD THE RIGHT TO DECIDE HOW AND IN WHAT MANNER TO EXPLOIT THEIR WORKS — SUBJECT TO A NARROW FAIR USE DEFENSE

A. Fair Use Is A Limited Defense To A Copyright Owner's Statutory Rights of Exclusivity in Copyrighted Expression

Section 106 of the Copyright Act of 1976 (17 U.S.C. § 106) grants the copyright owner of a song or other musical work, subject to fair use under § 107 and other exceptions in §§ 108-120, the exclusive right to engage in and authorize others to engage in the following activities: "to reproduce the copyrighted work in copies or phonorecords;" to "prepare derivative works based upon the copyrighted work;" to publicly distribute copies or phonorecords of the musical work; and to publicly perform the musical work. By granting such exclusive rights, § 106 establishes marketable property rights in accordance with the constitutional concept underlying copyright and thereby "supplies the economic incentive to create and disseminate ideas." *Harper & Row*, 471 U.S. at 558 ("the Framers intended copyright itself to be the engine of free expression"); *Mazer v. Stein*, 347 U.S. 201, 219 (1954).

By contrast, fair use under § 107 is a "limited exception" to the property rights conferred by the Copyright Act, *Maxtone-Graham v. Burtchaell*, 803 F.2d 1253, 1255 (2d Cir. 1986), *cert. denied*, 481 U.S. 1059 (1987). It is a "privilege" allowing the abridgment or copying of copyrighted material in special circumstances without obtaining permission from or compensating the copyright owner, thus depriving the owner of the usual benefits of copyright protection. *Harper & Row*, 471 U.S. at 549. It is an "affirmative defense requiring a case-by-case analysis," whose touchstone, as revealed by such core fair uses as small quotations in reviews, critical articles, news reporting and scholarship, is: "would the reasonable copyright

owner have consented to the use?" *Harper & Row*, 471 U.S. at 561, 550.

The fair use defense is equitable at its core. It requires courts, on the particular facts of each case, to focus on and weigh all of the statutory and other relevant considerations either favoring or disfavoring a fair use in determining whether, on balance, there are compelling equitable reasons to deprive the copyright owner of the exclusive property rights granted in § 106. *See Sony*, 464 U.S. at 448; *Harper & Row*, 471 U.S. at 560.

Notwithstanding the limited and exceptional nature of the fair use defense, exclusive rights of copyright are not antithetical to First Amendment values, but are a central element of a legal structure that fosters the creation of valuable works. *Harper & Row*, 471 U.S. at 546, 558; *Schnapper v. Foley*, 667 F.2d 102, 114 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 948 (1982). Copyright serves that purpose by providing protections and sufficient inducements, most but not all of which are economic, to that creative process. Copyright does not hamper the free discussion of ideas or criticism of works, because the "definitional balance" struck by the idea and facts-expression dichotomy permits the presentation and use of ideas and facts without restriction; only the form of expression is protected. *Harper & Row*, 471 U.S. at 556.

B. Congress Refused to Subject Songwriters to Compulsory Licenses for Phonorecords That Would Impair Their Creative Control or the Integrity of Their Compositions

Any presumption that song parodies may be recorded and distributed under the fair use doctrine would be incompatible with Congress's limitation on the scope of permitted use in § 115 of the Copyright Act of 1976.

Section 115 is the statutory compulsory license that, where it applies, authorizes any person to make and distribute phonorecords of any previously recorded nondramatic musical work such as "Oh,

Pretty Woman" and the thousands of songs written and composed by *amici*.[2] That provision is relevant in analyzing the extent to which parodies of songs are protectable as fair use because Congress specifically *excluded* from the compulsory license any arrangement or derivative work (which would include parody or satire[3]) that would "*change the . . . fundamental character of the work . . . except with the express consent of the copyright owner.*" 17 U.S.C. § 115(a)(2) (emphasis added).

As explained by the House and Senate reports accompanying passage of the 1976 Copyright Act, the statutory license provisions and limitations of § 115 were

> intended to recognize the practical need for a limited privilege to make arrangements of music being used

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[2] Section 115 provides, in pertinent part:

> In the case of nondramatic musical works, the exclusive rights provided by clauses (1) and (3) of section 106, to make and distribute phonorecords of such works, are subject to compulsory licensing under the conditions specified by this section.
>
> (a) AVAILABILITY AND SCOPE OF COMPULSORY LICENSE.— * * * *
>
> (2) A compulsory license includes the privilege of making a musical arrangement of the work to the extent necessary to conform it to the style or manner of interpretation of the performance involved, but the arrangement shall not change the basic melody or fundamental character of the work, and shall not be subject to protection as a derivative work under this title, except with the express consent of the copyright owner.

[3] Although not all parodies are derivative works (*see* n.8 and Addendum B, *infra*), any parody that is "based on" a copyrighted work is, *ipso facto*, a derivative work of that work. *See* 17 U.S.C. § 101 (defining "derivative work" as "a work based upon one or more preexisting works"); *Stewart*, 495 U.S. at 213 n.1 (same).

> under a compulsory license, *but without allowing the music to be perverted, distorted, or travestied.*[4]

Congress limited the compulsory license to recordings that do not make "fundamental" alterations of the original music because of its "strong concern for the original artist's reputation,"[5] and

> respect for the integrity of a musical composition [that] evinces Congressional regard for the moral rights of composers, the sole explicit recognition of moral rights in the entire Copyright Act until passage of the Visual Artists Rights Act of 1990.[6]

Amici do not contend that a derivative work that is ineligible for a compulsory license because it perverts, distorts, travesties or otherwise alters the fundamental character of a copyrighted song is thereby, *ipso facto*, rendered ineligible for fair use as well. *Amici* do suggest that the provisions and purposes of § 115 are very important in fair use analysis of song or musical recordings and, as an expression of congressional policy, should be considered a significant factor disfavoring fair use in cases where the fundamental character of a work has been altered, distorted, perverted or tarnished.

First, § 115 embodies into law a legislative judgment that composers (and their heirs or assignees) have legitimate interests in

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[4] H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. at 109 (1976) (emphasis added); S. Rep. No. 94-473, 94th Cong., 1st Sess. at 89 (1975). Congress imposed a similar limitation in the "Guidelines for Educational Uses of Music" which the House Judiciary Committee endorsed and inserted into the report accompanying the bill enacted as the 1976 Copyright Act. *See* H.R. Rep. No. 94-1476 at 71 (editing or simplifying music purchased for classroom use is fair use "provided that the fundamental character of the work is not distorted or the lyrics, if any, altered").

[5] I Paul Goldstein, *Copyright*, § 5.4.2, at 581 (1989).

[6] 2 M. and D. Nimmer, *Nimmer on Copyright*, § 8.04[F] (1992).

protecting the artistic integrity and creative control of their works. Second, § 115 reflects congressional confidence that courts have the competence to distinguish between song recordings that do and do not change the fundamental character of the original, whether by pervasion, distortion, travesty, or other means. Third, and most importantly, any rule presuming that commercially distributed song parodies are presumptive fair use, as suggested by petitioners and their *amici*, would flout the command of § 115 and its underlying policies. Such a rule, in the guise of fair use under § 107, would allow unauthorized alterations of copyrighted material to be made, performed and widely distributed without the permission of or compensation to the copyrighted owner, when concurrently Congress denied such unauthorized alterations any § 115 privilege of a compulsory license, even on the proffer of the statutory fee (as here, *see* JA 87).

It is therefore difficult to imagine, in the name of parody, satire or social commentary, extending any presumptive fair use rule to changes of lyrics and music such as those made primarily for commercial gain, when those changes alter, distort or degrade the lyrics and the music of the original work and have, in any event, no greater creativity or benefit to society than either the original or licensed derivative works that obtain permission and pay their way. (John Coltrane's celebrated version of Rodgers and Hammerstein's "My Favorite Things" is a well-known example of a licensed alteration of a copyrighted song. What policy is served by requiring payment for his use of "My Favorite Things" but giving The 2 Live Crew a free ride?)

Because the limitation of the § 115 compulsory license to close arrangements was intended to require those who would alter songs to the extent that The 2 Live Crew altered "Oh, Pretty Woman" to obtain the copyright owner's "express consent," any result that presumptively frees them from both the owner's discretion and payment of any required license fees violates the congressional plan.

II. PARODIC, SATIRICAL OR HUMOROUS USES ARE ELIGIBLE FOR FAIR USE ONLY UPON TRADITIONAL FACT-INTENSIVE, CASE-BY-CASE ANALYSIS, NOT ON A CATEGORICAL BASIS

A. Case-By-Case Consideration, Required For Fair Use Determinations Generally, Is Mandated By The Variety Of and Differences Among Works Considered to be Parodies

It is well settled that fair use cannot be determined other than on a case-by-case, fact-intensive basis, and is not susceptible to broad, outcome-determinative generalization. Despite their concentrated attention, able judges since Justice Story, leading commentators, and even Congress itself have been unable to devise any mechanical test or standard that can be applied without focused concentration on and weighing of a variety of relevant factors grounded in the concrete particulars of any particular case. This Court's opinions in *Harper & Row* and *Sony* repeatedly stressed that Congress insisted upon the essential requirement of case-by-case equitable analysis.[7]

Concerning the boundaries of "parody" as it is discussed in copyright cases, as petitioners and their *amici* have unwittingly demonstrated, there is no agreement among the courts or commentators. Proper usage, however, limits a parody to a work that ridicules the work which it mimics.[8] More importantly, for present

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[7] *See Harper & Row*, 471 U.S. at 549, 561, and *Sony*, 464 U.S. at 448 & n. 31. *See also* Wendy J. Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and its Predecessors*, 82 Col. L. Rev. 1600, 1601-03 (1982).

[8] A "parody," according to the *Oxford English Dictionary* (1933, reprinted 1978) (emphasis added), is

> 1. A composition in prose or verse in which the characteristic turn of thought and phrase of an author or class of authors are imitated in such a way as to make them appear
>
> (continued...)

purposes, the huge variety of works that petitioners and their supporters consider to be "parodies" and for which they seek expanded and presumptive protection differ among themselves according to a panoply of factors that are relevant to fair use analysis. Those factors lie along at least four separate axes:

- What is the extent of appropriation? Many song "parodies," including a great many cited by petitioners and their *amici*, take no copyrightable expression, mimicking only "style" at a level of generality well beyond that to which copyright ex-

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[8](...continued)

> ridiculous, especially by applying them to ludicrously inappropriate subjects; an *imitation* of a work *more or less closely modeled* on the original, but so turned so as to produce a ridiculous effect . . . .
>
> 2. *transf.* and *fig.* A poor or feeble imitation, a travesty.

See also The American Heritage Dictionary, Second College Edition (1991); *Webster's Third New International Dictionary* (1976). A parody, whatever its form, need not involve any copying, taking or close paraphrasing of the original work, but it must at a minimum make ridiculous what it is modelled on, not some other person or institution. *Fisher v. Dees*, 794 F.2d 432, 436 (9th Cir. 1986); *Rogers v. Koons*, 960 F.2d 301, 310 (2d Cir.), *cert. denied*, 113 S.Ct. 365 (1992); *MCA, Inc. v. Wilson*, 677 F.2d 180, 185 (2d Cir. 1981). Commentators have made the same distinction, *e.g.*, Wendy J. Gordon, *A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 Yale L.J. 1533, 1601-02 (1993) (distinguishing and finding important differences between uses where work mimicked "is itself the object of the parody" from uses referred to as satire that use the original work as vehicles to ridicule public figures or other aspects of society or politics). The works cited as parodies by many of the *amici* — including most of the songs of Mark Russell and the Capitol Steps, for example — are not "parodies" at all under correct usage (although they may or may not be fair use, which is quite a different question). In any event, this case does not present any fair use issue concerning such political satires.

tends and therefore raising no fair use issue;[9] some parodies take copyrightable expression but no more than necessary to "conjure up" a parodied original;[10] some take more (and some *far more*) than that.

- How "commercial" is the planned distribution? Some "parodies" are created and distributed pursuant to methodical commercial plans to exploit the mass market for recorded popular music (The 2 Live Crew's album containing "Pretty Woman" sold 248,000 copies by August 1990); others for small cabaret or private performances (the Capitol Steps' "I'm Just Wild About Harry", or "Scalia," which was composed and sung to the melody of Bernstein's *Maria* by reporters at a recent Gridiron Club dinner in Washington, D.C.[11]).

- Is there a parody or satire at all, and if so, how creative and productive is it — where does the work fall on a line from comment or criticism or political satire, on the one hand, to simple free-riding on a recognizable melody, perhaps with the substitution of dirty or offensive lyrics, on the other? Courts are able to determine relevant differences between, on the one hand, The Capitol Steps' "Why Not Take Al and Me," to the tune of "All of Me," or Tom Stoppard's *Rosencrantz &*

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9 Beerbohm's parody of Henry James is a classic example. *See also, e.g.*, some of Peter Schickele's works, which mimic the style but not original content of works by Bach and others. *See generally* Addendum B *infra*, identifying many examples of parodies mentioned in the briefs of petitioners and their *amici* that do not appropriate copyrightable expression.

10 *See, e.g., Elsmere Music, Inc. v. National Broadcasting Co.*, 482 F. Supp. 741 (S.D.N.Y.), *aff'd*, 623 F.2d 252 (2d Cir. 1980); *Fisher v. Dees*, 794 F.2d 432.

11 *See* David Broder, *What A New Justice Needs: Intellect Seasoned With Street Smarts*, Chi. Trib., April 1, 1993 at N 23.

Guildenstern Are Dead, and, on the other hand, "The Cunnilingus Champion of Company C,"[12] or a singing telegram franchiser's travesty of Superman and Wonder Woman featuring "Super Stud" and "Wonder Wench."[13]

- Who or what is the target? Some works aim at a particular work or author (*e.g.*, Beerbohm's famous parody of Henry James), others aim at genres (Mel Brooks' *Blazing Saddles*), while satire usually ridicules or lampoons exclusively, or largely, some third party or social institution. There is no reason to suspect broad "market failure" in licenses for satires.[14] *Amici* have licensed their songs for satires. *See*

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12 *MCA v. Wilson*, 677 F.2d 180.

13 *D.C. Comics, Inc. v. Unlimited Monkey Bus., Inc.*, 598 F. Supp. 110 (N.D. Ga. 1984).

14 Summarizing the extensive case law distinguishing between parodies (works that purport to ridicule the works they mimic) and satires, Professor Goldstein notes that satires are entitled to little fair use consideration:

> One reason is that the copyright owner who is not willing to license a parody of his work may be more than willing, at a reasonable price, to license use of his work as a vehicle for social comment. Since negotiations will not inevitably be fruitless, the satirist should be required to go to the bargaining table with the copyright owner . . . even if the copyright owner refuses to license the proposed satirical use, no good reason exists for the satirist to get a free ride on the plaintiff's work. There will rarely be a shortage of other works . . . that, with some ingenuity, can be made to serve as equally effective vehicles for the intended satire. The importance of this last point is underscored by the rule, applied in fair use cases generally, that, for the fair use defense to apply, the defendant's work must by its nature require defendant to use plaintiff's work.

II Paul Goldstein, *Copyright* §10.2.1, pp. 211-12 (1989) (footnotes omitted).

Addendum A. The generalized assertion that licenses are not available for parodies is also incorrect. *Amici* have granted licenses for parodies (*see* Addendum A), and Weird Al Yankovic's parodies, which sell in the millions of copies, are licensed as well (*see* JA 325 and Brief of *Amici Curiae* Capitol Steps Production, Inc. *et al.*, at 16a).

Because the proper identification and weighing of all these factors on the facts of any case is plainly relevant to a fair use determination, identification of a work by its creator as a "parody," or even judicial characterization of a work as a genuine parody, cannot conceivably be dispositive or weigh presumptively in favor of fair use.

The suggestion that it is not for courts to assess these factors in the case of works claimed to be parody or satire is meritless. The putative infringer who defends by asserting fair use is necessarily asking the court to make that determination (to the extent that whether a work is a parody is relevant at all), just as those asserting fair use often require courts to determine whether a work is "criticism" or "comment" and to assess its "character." 17 U.S.C. § 107. Other provisions of the Copyright Act require courts to make comparably difficult judgments. *See, e.g.*, 17 U.S.C. § 106A (requiring courts to assess, *inter alia*, whether a defendant has or is about to make "any intentional distortion, mutilation, or other modification" of a work, and whether a work has "recognized stature"); 17 U.S.C. § 115 (requiring courts to assess whether a recording has changed the "fundamental character" of the recorded work).

It is unavoidable that in determining whether there is compelling equitable justification for the fair use exception in a particular case, the court must assess the nature of the use (including whether a particular work mocks or ridicules the work it copies) and its purpose (*e.g.*, to communicate political satire, or merely to use a familiar tune as the vehicle to attract attention with the familiar or for the coarse and vulgar, as in *MCA v. Wilson*). The putative infringer cannot, at the same time, ask a court for a ruling that the work is fair

use and then complain that the court may not make a determination of the purpose and character of the work.

B. Parodies Are Not Entitled to Generic Special Treatment Denied to Other Categories of Speech Eligible to be Fair Uses

There is no warrant for making parodies presumptively fair use.

Although § 107 designates a number of categories of purposes or uses as candidates for fair use, including "criticism, comment, news reporting, teaching . . . , scholarship, or research,"[15] those categories are only *eligible* for the fair use "defense," and are not presumptively entitled to it. Any judicial determination concerning the fair use issue requires the full analysis that § 107 commands. Congress insisted, as this Court held in *Harper & Row*, that the § 107 categories were

> not intended . . . to single out any particular use as presumptively a "fair" use. . . . [and] resisted pressures from special interest groups to create presumptive categories of fair use, but structured the provision as an affirmative defense requiring a case-by-case analysis.

Harper & Row, 471 U.S. at 561.

The principal basis advanced by petitioners and their *amici* for holding parodies to be presumptively fair use — that parodies are "criticism" and "comment" specifically mentioned in § 107, categories of speech which are particularly valuable — cannot be squared with *Harper & Row* or with the text of § 107. There is no basis for concluding that parody is more important than, for example,

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[15] Those categories are not the only candidates for fair use; the list in the first sentence of § 107 is non-exclusive. *See Harper & Row*, 471 U.S. at 561 (citing S. Rep. No. 94-473 at 61).

the news reporting that this Court held in *Harper & Row* was not presumptively entitled (and, on the facts of that case, not entitled at all) to fair use.

Nor is their any basis for concluding that the broad range of works that could arguably be termed "parodies" are in fact comment or criticism. Some works meeting the dictionary definition of parody — that is, works that take aim at the work copied — may be. Some satires (using the melody of one work to poke fun of some unrelated person or institution) may use the work copied for comment or criticism. But many humorous settings of new words to old melodies are neither comment nor criticism — for example, the "Cunnilingus Champion of Company C" is not. As Professor Gordon observes at pp. 1601-02 of her recent article (*supra*, p. 11, n.8),

> when a comedian writes a ditty like "When Sonny Sniffs Glue" (parodying "When Sunny Gets Blue"), or Mad Magazine publishes a lyric entitled "Louella Schwartz Describes Her Malady" (parodying "A Pretty Girl is Like a Melody), it seems as if any song might do as a vehicle. The parodist's purpose is simply to take some familiar song, any song, and create humor by showing the unexpected changes that can be rung upon its meter and rhyme scheme. . . . Nor could the parodist easily make a claim based on equality with first creators.

Nor is there any need to copy a substantial amount of expression in order to create a parody. For example, the musical *Grease* parodies the genre of 1950's rock-and-roll without copying any particular work. The examples of parodies larded through the briefs of the *amici* supporting petitioners make clear that denying the opportunity to take substantial amounts of prior copyrighted material would not inhibit genuinely creative new work ridiculing prior creative work or noted persons or institutions. The creativity involved in most of the examples of parody used by petitioners' *amici* did not take any original expression at all, or did so years after any

copyright would have expired. (*See* Addendum B). The very premise of protecting works for "limited times" is that some uses, while worthwhile, can wait until copyright has expired.

The other basis advanced by petitioners and their *amici* for treating parodies as presumptively fair uses, equally without merit, is alleged market failure. This theory rests on the alleged "facts" (which are not of record and rest on nothing more than *ipse dixit*) that obtaining permission at market prices is impracticable or simply unavailable. But extensive licensing markets and organized systems for obtaining permission or authorization, in which *amici* and others actively participate, preclude any notion that obtaining licenses is generally impracticable. Seeking and obtaining permission (assuming it would be granted) is *always* practicable for mass-market recorded "parodies," given the lead time that goes into mass-marketed recordings. (By contrast, the need for spontaneity and speed in some cases, as with Mark Russell's evening performance of a song he wrote in the morning in response to late-breaking events, may well be a factor favoring fair use. *See, e.g.*, H.R. Rep. No. 94-1476 at 69, recognizing that spontaneity and the need for capturing a moment is a factor that may favor fair use). Furthermore, permission often *is* available. *Amici* themselves are frequently asked for and grant permission for parodies (when they themselves are the targets) and for satirical uses as well (targeting others). For example, *amici* (and other composers and songwriters as well), have licensed their works to be commercially parodied in the cabaret *Forbidden Broadway*, as shown in Addendum A below.

Here, as in *Harper & Row*, 471 U.S. at 557 n. 6, "it bears noting that Congress in the Copyright Act recognized a public interest warranting specific exemptions in a number of areas," but failed to craft any such exemption for commercial parodies, or for parodies generally.

III. STATUTORY FOUR FACTOR ANALYSIS AND RELEVANT EQUITABLE CONSIDERATIONS COMPEL REJECTION OF ANY PRESUMPTION FAVORING PARODIES OR SATIRES AS A FAIR USE

Because petitioners' fair use defense (and those of other parodists or takers for satirical or humorous uses) depends on the usual application of the four statutory factors and other equitable considerations, principles relating to those matters are worthy of further discussion.

A. First Factor — Purpose and Character of the Use

1. A Profit-Motivated Commercial Use For Entertainment Purposes Disfavors Fair Use. The authorities are unanimous that a commercial use for a profit-motivated purpose is presumptively unfair in first factor analysis (the "*Sony* presumption"). *Harper & Row*, 471 U.S. at 562; *Sony*, 464 U.S. at 451; *Stewart*, 495 U.S. at 237. This principle simply executes the first factor statutory command that in each case the court must consider the "purpose and character of the use, including whether such use is of a commercial character or is for non-profit educational purposes."[16]

Observing that many humorous uses in our society, and most that attempt to reach the mass markets, are commercial, petitioners and their *amici* attack the *Sony* presumption as overbroad and unfairly stacking the deck against parodies. But as *Harper & Row* teaches, the *Sony* presumption simply recognizes that it is presumptively reasonable and fair to expect commercial users, who set out to generate revenues and profits, to pay for their intellectual property

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[16] The ordinary meaning of the word "commercial" is an activity relating to commerce or trade, looking toward financial profit, or having profit as the primary aim. *Webster's Third New International Dictionary (1976)*; *Oxford English Dictionary*, Vol. II (1978); *The American Heritage Dictionary*, Second College Edition (1991).

inputs if the copyright owner authorizes the use, just as they pay for other inputs.

Lower courts have on occasion found the *Sony* presumption outweighed or rebutted where a very limited use was heavily transformative (so that defendants were profiting largely from their own creativity, rather than the borrowed work), and the character of the use, albeit commercial, was for "broader public purposes." *See Twin Peaks Productions, Inc. v. Publications Int'l, Ltd.*, No. 92-7933, 1993 U.S. App. LEXIS 13454 at *19 (2d Cir. June 7, 1993) (citing such cases involving scholarly biographies and works of non-fiction).

Whatever reasons there might be for finding the *Sony* presumption outweighed when the infringing work serves salutary public purposes (and even in *Harper & Row* the public importance of the news reporting use was not considered to be a factor heavily favoring fair use), certainly those reasons are inapplicable to profit-motivated works whose primary purpose is entertainment. If the *Sony* presumption disfavoring a commercial use as a fair use is not applicable to mass-marketed works of entertainment sold in the same record stores as the copyright owner's works, such as The 2 Live Crew's widely distributed *As Clean As They Wanna Be*, then that presumption, as petitioners and their *amici* wrongly urge, would be a dead letter.[17]

2. First Amendment Considerations Do Not Categorically Favor Fair Use for Parodies, Satires or Humorous Uses. Properly understood, copyright protection does not interfere with Free Speech interests in comment and criticism, but rather serves them, by

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[17] Notwithstanding petitioners' after-the-fact defense of parody, it should be decisive for first factor purposes disfavoring fair use that "Pretty Woman" was included on an album that was marketed as straight entertainment, that it was not marketed as a parodic, satiric or humorous work (such as licensed recordings by Mel Brooks or Weird Al Yankovic, for example), and that authorship was attributed to the writers of the original "Oh, Pretty Woman."

fostering the creation and wide dissemination of music and other works. *Feist Pub., Inc. v. Rural Tel. Serv. Co.*, 111 S. Ct. 1282 (1991); *Harper & Row*, 471 U.S. at 557-58; *Schnapper v. Foley*, 667 F.2d at 114; *In re Capital Cities/ABC, Inc.*, 918 F.2d 140, 143-44 (11th Cir. 1990) ("the First Amendment is not a license to trammel on legally recognized rights in intellectual property") (citations omitted). *See also* II Goldstein, *Copyright*, § 10.3; 1 *Nimmer on Copyright* § 1.10.

The demand by petitioners and their *amici* that there must be a parody or satirical use exception to the *Sony* presumption is indistinguishable from a comparable request in *Harper & Row* that the Court firmly and wisely rejected, stating:

> In view of the First Amendment protections already embodied in the Copyright Act's distinction between copyrightable expression and uncopyrightable facts and ideas, and the latitude for scholarship and comment traditionally afforded by fair use, we see no warrant for expanding the doctrine of fair use to create what amounts to a public figure exception to copyright. Whether verbatim copying . . . in a given case is or is not [a] fair [use] must be judged according to the traditional equities of fair use.

471 U.S. at 560. That same reasoning and those same principles are entirely applicable here.

3. The Extent of Any Productive and Transformative Use is Part of First Factor Analysis. Whether the new work serves a transformative purpose, *i.e.*, uses and transforms a limited portion of a prior copyrighted work in the course of creating a new work for a socially desirable purpose, such as literary criticism, is part of first factor analysis. Thus, where the parody, satire or humorous use does make a meaningful comment or criticism of some person, institution, or prior work that would be understood as such by its audience, then that element (although not the entire first factor) would weigh in the

user's favor. By contrast, a parody or satirical use that, for example, lacks or is not distributed or performed as having political or meaningful social content is not entitled to any special first factor credit.

Where the purpose and character of the use is simply to exploit interest in the prior copyrighted work or to taint or tarnish it — not by criticizing or commenting, but merely as a vehicle for entertainment or to satisfy baser tastes for coarseness or vulgarity, or to substitute for the user's own lack of creativity — there is a lack of productive or transformative quality that courts need consider affirmatively for first factor purposes. *See MCA v. Wilson*, 677 F.2d 180; *D.C. Comics v. Unlimited Monkey Bus.*, 598 F. Supp. 110.

B. Second Factor — The Nature of the Copyrighted Work

The appropriation of any of respondent's or *amici's* music or lyrics, regardless of purpose, points against fair use. Music and lyrics are quintessentially creative and therefore deserving of strong copyright protection. *Stewart*, 495 U.S. at 237.

C. Third Factor — The Amount and Substantiality of the Portion Used

In *Harper & Row*, the Court held that the third factor favored the copyright holder even though only very little of the work was taken — 300 words from a book of hundreds of pages. The reasoning was that the work taken was qualitatively substantial, the "heart" of the copyrighted work. That same reasoning applies to the case at bar, and would apply whenever a comparably central portion of a song (or more) were taken by a commercial infringer for parody or humorous satirical use — unless there is something special about such works that would exempt them from the usual rule.

Although the course of the law's development on that question has not been smooth, one rule is settled, and correctly so: where extensive expression is copied the third factor points against fair use,

and indeed fair use almost always will be unavailable.[18] The number of persons and entities in this nation who would, if given a chance, use the famous and recognizable melodies from such past masters as Berlin, Bernstein, Gershwin, Kern, Rodgers, Loewe, and Porter, is legion; were entire albums created with new lyrics to their songs, millions of copies could well be sold. Similarly, the ability of advertising agencies to create unlicensed humorous commercial advertisements using *amici's* melodies, in ways that experts might be found to opine were satirical or made the originals ridiculous, can hardly be overestimated. Copyright preserves these economic and artistic values for the copyright owners. (*See* Addendum A for examples of advertisements and other derivative works licensed by *amici*.)

Whether there is occasion for any special third factor credit for cases of true parody — whether copyists are entitled to do more than "conjure up" the original works — is a much-debated question whose analysis, *amici* believe, has seemingly overlooked the extent to which parody is possible without any actionable taking whatsoever. *See* the parodies cited in Addendum B.

In any event, here, as elsewhere, fair use is a question of degree in concrete factual circumstances. Certainly, the more taken, the more fair use is disfavored in third factor analysis. Applying that simple equitable insight, it is notable that the cases in which song

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[18] *See Walt Disney Prods. v. Air Pirates*, 581 F.2d 751, 756 (9th Cir. 1978), *cert. denied*, 439 U.S. 1132 (1979); *Warner Bros. v. American Broadcasting Cos.*, 654 F.2d 204 (2d Cir. 1981); *MCA v. Wilson*, 677 F.2d at 185. 3 *Nimmer on Copyright* (§ 13.05 [C], at 13-102.28(16)) approves the Second Circuit's retreat in *MCA* from dicta previously indicating virtually no limits to the degree of copying by a parody, noting that that Circuit's previous view, in *Elsmere*,

> went too far, suggesting an open-ended standard whereby wholesale appropriation of another's work becomes possible under the banner of fair use provided only that elements of humor are added.

parodies or humorous uses have been found to be fair use have generally involved very little appropriation of the original.[19]

D. Fourth Factor — Harm to the Potential Market For or Value of the Work

1. Users Have the Burden of Showing that Widespread Uses Like Theirs Would Be Unlikely To Deprive Owners of Potential Licensing Revenues. The fourth factor requires an examination of the facts to determine "the effect of the use on the *potential market* for or value of the copyrighted work," an inquiry that depends on logic, common sense and assessment of likely economic effects. *See Stewart*, 495 U.S. at 238 ("The record supports the Court of Appeals' conclusion that re-release of the film impinged on the ability to market new versions of the story. Common sense would yield the same conclusion"). Contrary to the view of the dissent below, of the district court, and of petitioners and their *amici*, the inquiry is *not* limited to whether a use would "fulfill[] the demand for the original" in the form that that work was first distributed (here, not limited to lost record sales of Roy Orbison's single "Oh, Pretty Woman"). Economic harm to be considered under the fourth factor pertains to the effect on both the original and derivative works and includes lost licensing income. *Id.*; *Harper & Row*, 471 U.S. at 568; *New Era Pub. Int'l ApS v. Carol Pub. Group*, 904 F.2d 152, 159 (2d Cir.), *cert. denied*, 498 U.S. 921 (1990). Moreover, relatively little need be shown by the copyright owner

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[19] *Compare, e.g., Fisher v. Dees*, 794 F.2d at 434 (song copied only six bars of music, and no lyrics); *Berlin v. E.C. Publications, Inc.*, 329 F.2d 541 (2d Cir.), *cert. denied*, 379 U.S. 822 (1964) (none of the music was copied, and any copying of lyrics, if it existed at all, was barely actionable); and *Elsmere*, 623 F.2d at 253 (copying of only four notes of music, and the words "I Love") *with MCA v. Wilson*, 677 F.2d at 185 ("We are not prepared to hold that a commercial composer can plagiarize a competitor's copyrighted song, substitute dirty lyrics of his own, perform it for commercial gain, and then escape liability by calling the end result a parody or satire").

concerning harm; "[a]ctual present harm need not be shown" and it is not "necessary to show with certainty that harm will result" from the use. *Sony*, 464 U.S. at 451.

Sony formulated an additional important concept when it declared that although it is necessary in the case of non-commercial use to show "by a preponderance of the evidence that *some* meaningful likelihood of future harm exists," in the case of a commercial unauthorized use, the likelihood of meaningful future harm should be "presumed." *Sony*, 464 U.S. at 451. This presumption adverse to fair use in fourth factor analysis is interrelated with the "commercial" use presumption disfavoring a fair use under the first factor.[20] Both presumptions are based on the reasonable assumption that if the copier is making a commercial use of a copyrighted work, the copier would be willing to pay an economically reasonable amount for that use, and therefore that failure to do so would harm the copyright owner.

A related and critically important rule is that the relevant harm is not simply the harm caused by the specific unauthorized use at issue (here, The 2 Live Crew's song), but also the harm, often more important, that would flow from widespread conduct of that kind (here, the unauthorized commercial use for mass-market distribution of the melodies and basic lyrics of popular songs). *See Sony*, 464 U.S. at 451; *Harper & Row*, 471 U.S. at 568; H.R. Rep. No. 90-83, 90th Cong., 1st Sess. 35 (1967) ("Isolated instances of minor infringements, when multiplied many times, become in the aggregate a major inroad on copyright that must be prevented"); 3 *Nimmer on Copyright* § 13.05[A][4] at 13-102.26.

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[20] *Id.; Association of Am. Med. Coll. v. Cuomo*, 928 F.2d 519, 525 (2d Cir.), *cert. denied*, 112 S.Ct. 184 (1991); *Financial Info., Inc. v. Moody's Investors Serv., Inc.*, 751 F.2d 501, 510 (2d Cir. 1984), *cert. denied*, 484 U.S. 820 (1987); *Narell v. Freeman*, 872 F.2d 907, 914 (9th Cir. 1989).

As previously discussed, in view of the current widespread dissemination of electronic playback equipment and mass-marketed commercial musical recordings, sanctioning unauthorized copying to the extent undertaken by The 2 Live Crew would predictably increase — by sizeable, and likely huge amounts — the amount of unconsented, substantial, commercial use of works previously created by *amici* and other authors, and thereby deprive the copyright owners of licensing revenues to the extent they choose, as they frequently do, to authorize such uses. Indeed, such a decision would likely spawn a cottage industry in which writers would add new, parodic, satiric or "humorous" lyrics to copyrighted melodies of successful prior musical works, as happened to "Oh, Pretty Woman" after the district court's judgment. JA 326-27. The multiplication of persons copying *amici's* works, released from the restraints of copyright and actively profiting from the melodic and lyrical genius of those who labored long and hard for highly uncertain rewards, is antithetical to the constitutional and statutory scheme of copyright.

2. Tarnishment of the Work and Satiation of Its Potential Audience Can Have a Serious Adverse Effect on the Copyright Owner's Ability to License Future Uses. The record below (JA 325) reflects what *amici's* experience has shown, namely that demand for future copies or derivative uses of the original work may also be reduced in two further ways: first, by tarnishment through associating the work with new and unwanted meanings (harming not only economic values but also the creative control interest that copyright protects); and second, by over-exposing a melody or song, tiring the public's desire to hear the song again. Both of these effects are relevant fourth factor harms weighing against fair use.

a. Tarnishment. No one disputes that economic harm caused by a critically adverse review of a copyrighted work is not harm for fourth factor purposes, and on that principle the trial court refused to consider tarnishment, viewing it as indistinguishable from the effect of such a critical review. The court's refusal was basic error. Harm from criticism is different from harm flowing from a

commercially exploitative tarnishment of the original work that degrades, vulgarizes or otherwise demeans that original work, and thereby creates "a new meaning" for the song "in the minds of listeners." JA 325. *Cf. Young v. American Mini-Theatres, Inc*, 427 U.S. 50 (1976) (distinguishing harm to audience caused by content of films from reduced property values that result from nuisance in neighborhood); J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition*, § 24.16, at 24.131-135 (3rd ed. 1992) (collecting cases where trademarks were held diluted by tarnishment through use in unwholesome, degrading or dissonant contexts). Harm from a free-riding use of a popular melody also differs from the harm caused by a critical review.

Any doubt that courts can meaningfully distinguish between harm from criticism and harm from tarnishment or free-riding exploitation should be dispelled by Congress's recognition, in enacting § 115, of the importance of empowering creators to avoid alteration of the "fundamental character" of a work, including by "distortion, travesty, and perversion." *See supra* at 6-10.

Critical articles (even those that reproduce parts of a song or other musical work) do not attempt to exploit or capitalize on the popularity of the works they criticize. By contrast, works like those at issue in *MCA v. Wilson* or in this case harm the value of the works from which they are copied not by an appeal to the critical judgment of listeners, but rather by creating such negative associations, through distortion, perversion or travesty, that others who might otherwise have enriched the creators — potential purchasers of the original works or of licenses for derivative uses including advertisers and film producers — are deterred from doing so. Had The 2 Live Crew created and popularized a comparable version of Carly Simon's "Anticipation," for example, who could imagine that H.J. Heinz would have proceeded to license that song as the centerpiece of its advertising campaign? Would Revlon have purchased rights to Rodgers and Hammerstein's song "Gonna Wash That Man," if that song had become associated in the public mind with head lice?

Would Irving Berlin have had to stand by if "White Christmas" was recorded and widely sold with lyrics referring to cocaine?

It is illogical and unreasonable to grant creators such as *amici* the right, on the one hand, to carefully choose which theaters in which to present their works and which artists shall perform them, all from the artistic-economic judgment that only certain conditions will maximize the value of the work, while at the same time prevent them from stopping others from reshaping their works for commercial distribution with coarseness, vulgarity, or other distortion. Nearly every court to have squarely addressed this point has agreed.[21]

b. Satiation. Satiation of the potential market by over-exposure is another means by which parodies or other satirical or humorous uses harm potential markets for copyrighted works. The judgment of *amici* and many others is that the value of their copyrights is maximized by carefully limited distribution. Such musicals as *West Side Story* and *My Fair Lady* are licensed for first class revivals only infrequently, and The Walt Disney Company has achieved great success by maximizing demand through limiting release of its classic cartoons to short periods every few years. Were *amici's* songs subject under the fair use doctrine to unlimited parody, satire and humorous use in the mass markets of radio, television, film, videos and sound recordings, two forms of economic harm would quickly follow: extensive use without compensation to the copyright owner, and exhaustion of the public interest and consequent reduction of demand. JA 325. Because the statutory license substantially impairs *amici's* control over the dissemination of their highly successful works in original form, preserving the residual control over alteration of those works that Congress did provide for in §§ 106 and 115 is all the more important in order to protect the value of the works and their potential markets.

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[21] *See, e.g., MCA v. Wilson*, 677 F.2d at 185; *New Line Cinema Corp. v. Bertlesman Music Group, Inc.*, 693 F. Supp. 1517, 1529 (S.D.N.Y. 1988) (citing additional cases).

E. Summing Up the Factors And Deciding the Case

Based on the principles that we have discussed, the case should be decided based on traditional fair use analysis, and under all the relevant facts and circumstances, petitioners should not be accorded the shelter of fair use. *Amici* place particular weight on petitioners' commercially exploitative use of a creative work for a profitable entertainment purpose, and the minimal nature (if any) of comment or criticism in the venture. This is reflected in the song's inclusion on an album marketed as straight entertainment; the taking of the central musical elements of "Oh, Pretty Woman," and the repetition of its first verse so as to trade on its popularity and familiarity; the attribution of authorship of the altered version to the writers of the original song, to trade on their fame; the harm to the value of and markets for the song caused by the sale of over 248,000 copies of the derivative use of their song; the potential harm to the original from tarnishment and over-exposure; the record evidence showing the likely increase in unlicensed uses if petitioners' fair use claim were upheld; the existence of active licensing of "Oh, Pretty Woman"; the absence of any political speech or criticism in petitioners' use; and the availability of other means for petitioners to criticize those aspects of culture and society they allegedly targeted. The judgment below should therefore be affirmed.

A use such as The 2 Live Crew's in this case, which used a substantial portion of a copyrighted song for commercial purposes through exploitation of the mass market, differs substantially from some of the uses engaged in by petitioners' *amici*, such as The Capitol Steps and Mark Russell. A satirical re-write of a tune by Bernstein or Berlin performed at the Gridiron Dinner, or at the Shoreham Hotel in Washington, D.C., will not satiate public demand as might use on The Tonight Show with Jay Leno. Courts may and should take account of such relevant differences, just as *amici* do.

CONCLUSION

The art of parody or satire is not in jeopardy if the judgment below is affirmed, as it should be based on the facts of this case applying traditional fair use principles expressed in the statute and in prior decisions of this Court. At most, if that judgment is not affirmed, there is no basis for determining as a matter of law that petitioners' use is a fair use, and in the procedural posture of this case (where only the defendants moved for summary judgment), the case should be remanded to the trial court for plenary development and adjudication of all of the pertinent facts and relevant fair use considerations in accordance with the principles applicable to parody laid down by this Court in this case.

Respectfully submitted,

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ADDENDUM A

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EXAMPLES OF LICENSING BY *AMICI CURIAE*

A. Parodies and Satires Performed in Cabarets

- Alan Jay Lerner and Frederick Loewe's song "I Remember It Well" was licensed for use with altered lyrics by "The News In Review," a group which performs musical political satires.
- Two Cole Porter songs were licensed for use with altered lyrics by "The News In Review."
- The producers of Forbidden Broadway, a long-running, frequently updated musical spoof on Broadway productions, have purchased licenses to use numerous songs composed by Richard Rodgers and Oscar Hammerstein, Irving Berlin, Leonard Bernstein, Alan Jay Lerner and Frederick Loewe, and numerous others, and to create and perform derivative works with new humorous lyrics, including, for example:
  - "Madonna's Brain," sung to the tune of Lerner and Loewe's "The Rain in Spain."
  - "I've Grown Accustomed to This Show," sung to the tune of Lerner and Loewe's "I've Grown Accustomed to Her Face."
  - "Just You Wait, Julie Andrews," sung to the tune of Lerner and Loewe's "Just You Wait, Henry Higgins."
  - "Chita/Rita," sung to the tune of Bernstein's "America."
  - "A Few of My Souvenir Things," sung to the tune of Rodgers and Hammerstein's "My Favorite Things."

- "Climb Every Rainbow," sung to the tune of Rodgers and Hammerstein's "Climb Every Mountain."
- "The Farmer and the Cowman," sung to the tune of Rodgers and Hammerstein's "Farmer and the Cowman."
- "I'm an Asian, Too," sung to the tune of Irving Berlin's "I'm an Indian, Too."
- Irving Berlin's song "Anything You Can Do," sung by the helicopter from the musical "Miss Saigon" and the chandelier from the musical "Phantom of the Opera." The lyrics were changed from "Anything you can do, I can do better" to "Anywhere you can fly, I can fly higher."
- John Kander and Fred Ebb's song "New York, New York" was licensed to be performed with altered lyrics.

B. Derivative Works Distributed as Rock, Rap and Jazz Recordings

- Various Cole Porter songs, many of them with altered arrangements and some with altered lyrics, were licensed to be performed by rock and rap singers on an album and videotape entitled "Red, Hot + Blue."
- Rodgers and Hammerstein's "My Favorite Things" was licensed for use by John Coltrane for his jazz version.

C. Derivative Works for Television

- Children's Television Workshop purchased a license to record Cole Porter's songs "I Get A Kick Out of You" and "Let's Do It" with substituted lyrics for "Sesame Street."

- Children's Television Workshop purchased a license to record the songs "I Remember It Well" and "Wouldn't It Be Loverly", by Alan Jay Lerner and Frederick Loewe, with substituted lyrics for "Sesame Street."
- "Soliloquy" by Rodgers and Hammerstein is licensed, without cost, to be performed annually with special lyrics in the Jerry Lewis Telethon for the Muscular Dystrophy Association.
- Cole Porter's "You Do Something for Me" was licensed for use with substituted lyrics in the British television series "Jeeves and Wooster."

D. Advertising

- Bristol-Myers Company purchased a license to use the song "I'm Gonna Wash That Man Right Outta My Hair" by Rodgers and Hammerstein in a television advertisement, with the word "man" replaced by the word "gray." The licensing fee was $72,500 for the first year, and $80,000 per year for the next two years, with additional sums required for use of the song in any radio advertising.
- General Electric company purchased a license to use Alan Menken's song "Git It (Feed Me)" from the show "Little Shop of Horrors" in a battery advertisement. The same song has also been licensed for use in an advertisement for Pizza Hut.
- United Airlines purchased a license to use George Gershwin's "Rhapsody in Blue" in a television advertisement.
- Dove Chocolate purchased a license to use George Gershwin's "Concerto in F" in its advertisements.
- George Gershwin's song "Somebody Loves Me" was licensed for use in an advertisement for Post Raisin Bran.

- George Gershwin's "An American in Paris" was licensed for use in an ice cream advertisement in Italy.
- The songs "But Not for Me" and "Embraceable You" by George and Ira Gershwin were licensed for use in a Peugot Car advertisement in France.
- Ira and George Gershwin's song "'Swonderful" was licensed for use in a Crest toothpaste advertisement.
- "Summertime" by DuBose Heyward and George and Ira Gershwin was licensed for use in a Dannon yogurt television advertisement in France.
- Cole Porter's "I've Got You Under My Skin" was licensed for use in a Vanish toilet bowl cleaner commercial, with the lyrics "I've got you under my rim". The song was also licensed for use in advertisements for Aramis Men Fragrances and Cheer laundry detergent (with no lyric changes permitted).
- Cole Porter's "You'd be So Nice to Come Home to" was licensed for use in an advertisement for Hilton Hotels.
- Cole Porter's song "Night and Day" was licensed for use in advertisements for Audi and for Air France.

E. Derivative Works for Film

- Leonard Bernstein's "Big Stuff" was licensed for use in the recent film "Malcom X."
- Woody Allen licensed and used numerous Gershwin tunes, including "Our Love is Here To Stay" and "Rhapsody in Blue," in his film "Manhattan."
- George and Ira Gershwin's songs "But Not for Me" and "Let's Call the Whole Thing Off" were licensed for use in the film "When Harry Met Sally"

F. Performances

- Songs and other musical works of *amici* have been licensed for performance world-wide through ASCAP or BMI.

G. Other

- The state of Oklahoma is licensed, without cost, to use Rodgers and Hammerstein's "Oklahoma" as its state song and to use it in advertisements promoting tourism.
- The United States Postal Service is licensed, without cost, to print stamps celebrating the musical "Oklahoma."

ADDENDUM B

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PARODIES IDENTIFIED BY PETITIONERS AND THEIR *AMICI* THAT WOULD NOT HAVE NEEDED TO RELY ON A FAIR USE DEFENSE

A. Works That Did Not Appropriate Copyrightable Expression

- Henry James' style parodied by Beerbohm, A Mote in the Distance (1926)
- Style of Playboy Magazine parodied by Ramos
- 18th Century Opera styles parodied by Mozart, A Musical Joke (1787)
- Shostakovich, Symphony No. 7 (1941) parodied by Bartok, Concerto for Orchestra (Intermezzo) (1943)
- Wagner, Tristan and Isolde (1856) parodied by Debussy, The Golliwog's Cakewalk (1908)
- McLaughlin Group (TV show) parodied by Saturday Night Live skit
- Soap Operas parodied by Tootsie (1982 film) and Soap (TV series)
- Plays of Aeschylus and Euripides (5th c. B.C.) parodied by The Frogs and The Birds (Aristophanes - 405 and 414 B.C.)
- Canon Camera TV ad parodied by Saturday Night Live TV ad
- MTV Channel parodied by MTV: Give Me Back My Life (Comedy Central feature)
- Sports Illustrated (swimsuit issue) parodied by Sports Titillated (MAD Magazine)

- State Dept. Newsletter parodied by Anonymous, State Dept. Employees

B. Works Whose Copyright Protection (Assuming the Application of Protection Afforded by the Copyright Act of 1976) Would Have Expired

- The Lord's Prayer parodied by Anonymous, Concerning Pay for the Army (1780)
- Carroll, Alice in Wonderland (1838) parodied by Stackpole, Rosie in Squanderland (1936)
- Titian, Venus (1538) parodied by Manet, Olympia (1863)
- Manet, Olympia (1863) parodied by Rivers, I Like Olympia in Blackface (1970)
- Manet, Olympia (1863) parodied by Ramos, Manet's Olympia (1974)
- DaVinci, Mona Lisa (1506) parodied by DuChamp, (1915)
- DaVinci, Mona Lisa (1506) parodied by Warhol, Thirty Are Better Than One (1963)
- Tchaikovsky, 1812 Overture (1880) parodied by P.D.Q. Bach (Schickele), 1712 Overture
- The Odyssey (Homer - ca. 700 B.C.) Ulysses (Joyce - 1922)
- Don Quixote (Cervantes - ca. 1610) parodied by Guernica (Picasso - 1937)
- The Iliad (Homer - ca. 700 B.C.) parodied by Troilus and Cressida (Shakespeare - ca. 1609)
- Hamlet (Shakespeare - ca. 1600) parodied by Rosencrantz and Guildenstern Are Dead (Stoppard - 1967)

- The Importance of Being Earnest (Wilde - 1899) parodied by Travesties (Stoppard - 1975)
- The Last Supper (DaVinci painting - ca. 1497) parodied by M*A*S*H (1970 film)